

2006

# Brad Russell Childs v. Heather T. Childs : Brief of Appellee

Utah Court of Appeals

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**IN THE UTAH COURT OF APPEALS  
STATE OF UTAH**

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BRAD RUSSELL CHILDS,

Petitioner and Appellee,

v.

HEATHER T. CHILDS,

Respondent and Appellant.

Court of Appeals No. 2006-0011

Civil No. 954001350DA

---

**BRIEF OF THE APPELLEE**

---

**AN APPEAL FROM THE THIRD DISTRICT COURT  
SALT LAKE COUNTY, STATE OF UTAH  
THE HONORABLE TYRONE E. MEDLEY, PRESIDING JUDGE**

---

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UTAH APPELLATE COURTS  
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**BRIEF OF THE APPELLEE**

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**APELLATE COURT JURISDICTION**

Jurisdiction is proper in this Court pursuant to §78-2a-3(2)(h) Utah Code Annotated (2006).

**STANDARD OF REVIEW**

As the Appellant raises an issue of law the standard of review is for correctness without deference to the trial court's determination. Brinkerhoff v. Brinkerhoff, 945 P. 2d 113 (Utah Ct. App 1997).

**CONSTITUTIONAL PROVISIONS**

There are no constitutional provisions at issue in this case.

**STATUTORY PROVISIONS**

**RULE 33 UTAH RULES OF APPELLATE PROCEDURE**

**DAMAGES FOR DELAY OR FRIVOLOUS APPEAL; RECOVERY OF ATTORNEY'S**

FEES.

**(a) Damages for Delay or Frivolous Appeal.** Except in a first appeal of right in a criminal case, if the court determines that a motion made or appeal taken under these rules is either frivolous or for delay, it shall award just damages, which may include single or double costs, as defined in Rule 34, and/or reasonable attorney fees, to the prevailing party. The court may order that the damages be paid by the party or by the party's attorney.

**(b) Definitions.** For the purposes of these rules, a frivolous appeal, motion, brief, or other paper is one that is not grounded in fact, not warranted by existing law, or not based on a good faith argument to extend, modify or reverse existing law. An appeal, motion, brief or other paper interposed for the purpose of delay is one interposed for any improper purpose such as to harass, cause needless increase in the cost of litigation or gain time that will benefit only the party filing the appeal, motion, brief, or other paper.

**(c) Procedures.**

- (1) The Court may award damages upon request of any party or upon its own motion. A party may request damages under this rule only as part of the Appellee's motion for summary disposition under Rule 10, as part of the Appellee's brief, or as part of a party's response to a motion or other paper.
- (2) If the award of damages is upon the motion of the court, the court shall issue to the party or the party's attorney or both an order to show cause why such



damages should not be awarded. The order to show cause shall set forth the allegations which form the basis of the damages and permit at least ten days in which to respond unless otherwise ordered for good cause shown. The order to show cause may be part of the notice of oral argument.

- (3) If requested by a party against whom damages may be awarded, the court shall grant a hearing.

### **STATEMENT OF THE CASE**

#### **A. NATURE OF THE CASE, THE COURSE OF PROCEEDINGS, AND DISPOSITION IN THE COURT BELOW**

On June 29, 2001 the trial court conducted an evidentiary hearing. As of that time the Appellant had not paid child support or any support (R 786), the trial court offset the Appellant's support obligation against the equitable lien she had been awarded in the divorce that had been entered in 1997. (R. 797) The Appellant's equitable lien was completely offset by the order of January 12, 2006. (R. 927)

#### **B. STATEMENT OF FACTS RELEVANT TO THE ISSUES PRESENTED FOR REVIEW**

1. The instant appeal is from an evidentiary hearing of June 29, 2001.
2. Following the evidentiary hearing the trial court made the following Findings of Fact:
  - a. Appellee and Appellant were divorced pursuant to a Decree of Divorce that was entered on March 21, 1997. (R. 781)

- b. Pursuant to the Decree of Divorce the Appellee was awarded custody of the parties' three minor children, subject to the Appellant's rights of visitation. (R. 782)
- c. The Appellant was ordered to pay child support in the amount of \$184 per month, commencing in the first month after entry of the Decree. (R. 782)
- d. The Appellee was ordered to maintain medical insurance on behalf of the parties' minor children, with each of the parties to be responsible for one-half of the insurance premium attributable to the children.(R. 782)
- e. The parties were ordered to be equally responsible for any uncovered medical, dental, orthodontic, optical and prescription costs attributable to the children that were not covered by insurance.(R. 782)
- f. The Appellant was ordered to be responsible for one half of the work-related day care that the Appellee incurred on behalf of the parties' minor children.
- g. The Appellee was awarded the marital home, subject to the Appellant's equitable lien of \$34,000. (R. 783)
- h. That with the exception of \$3,234.19 which was garnished by Office of Recovery Services, the Appellant has failed and refused to pay any child support. (R. 786)
- i. The Appellant refused and failed to reimburse the Appellee for her share of the medical and dental insurance premium.(R. 786, 787)

- j. The Appellant refused and failed to pay for one half of the children's uncovered medical expenses.(R. 787)
- k. The Appellant failed and refused to pay her share of the cost of work-related day care.
- l. The Appellant claims that the equitable lien cannot be altered or offset against the obligations that she owes to the Appellant as she assigned her equitable lien to her attorney. (R. 789)
- m. That pursuant to §70a-9-318 U.C.A., the Appellant's attorney, the acid knee of the equitable lien, takes the equitable lien subject to any claims or demands against it. (R. 789)
- n. That the Appellant's attorney had notice of the Appellee's claim of offset. (R. 789)
- o. The trial court retains its jurisdiction over the case and all issues thereto.(R. 789)
- p. The Appellant had acted in bad faith in numerous ways including the assertion that she did not have to pay support while her appeal pending. (R. 790)
- q. The Appellant acted in bad faith in asserting that she did not have to pay work related day care as she did not approve of the provider. (R. 790)
- r. That it is the Appellant's intention, given her anger, and consistent with her practice, not to pay any support or support related obligations. (R. 790)

- s. That the Appellant acted in bad faith by “presenting an argument that the Court cannot offset her support obligations against her equitable lien, which in essence seeks to further deprive the parties’ children of the support that the Appellant refused to pay.” (R. 790)
  - t. That the Appellant refused to cooperate with the Appellee in any way. (R. 790)
  - u. That the Appellant should contribute \$4,000 to the Appellee’s reasonable attorney fees of \$8,733. (R. 790, 791)
3. The trial court made the following Conclusions of Law following the evidentiary hearing of June 29, 2001:
- a. The Court retains jurisdiction over all of the issues attendant to this case, including the Appellant’s equitable lien, and does have the jurisdiction and ability to offset the Appellant’s obligations against the equitable lien. (R. 792)
4. That \$21,978.54 was offset against the Appellant’s equitable lien of \$34,000. (R. 792)
5. That the Appellant’s equitable lien was completely offset by the Order of January 12, 2006, and the support arrearage that had accrued. (R. 927)

#### **CITATION TO THE RECORD**

The trial court ordered that the Appellant pay a portion of the Appellee’s fees. (R. 796)

#### **STATEMENT OF THE ISSUES PRESENTED FOR REVIEW**

1. The Appellee does not take issue with the Appellant’s Statement of Issue.

2. The following issues are presented in support of the Appellee's request for damages pursuant to Rule 33 of the Utah Rules of Appellate Procedure. Whether the Appellant and the Appellant's attorney should be jointly and severally responsible to pay the Appellee's fees and costs for pursuing a frivolous appeal whereas:

- i. The Appellant has failed to demonstrate that the issue raised on appeal was raised before trial court.
- ii. Although the issue raised by the Appellant is different from the issue raised before the trial court, the Appellant is still seeking to "... further deprive the parties' children of the support that the Respondent has refused to pay", an outcome determined by the trial court to be in bad faith.
- iii. The Appellant does not seek good faith reversal of existing case law. The Appellant does not distinguish the instant case from controlling and dispositive case law.
- iv. The Appellant does not cite to where the issue that is raised on appeal was preserved in the trial court, nor does the Appellant provide a statement of grounds for seeking review of an issue not presented in the trial court.
- v. The Appellant was ordered to pay a portion of the Appellee's attorneys' fees by the trial court rather than the entirety of the Appellee's fees, due to the Appellant's "limited resources".
- vi. The appeal will have no financial impact on the Appellant. The result the

Appellant seeks is that she not be deemed to have paid child support, that she not pay her own attorney, and even though she has acted in bad faith that she force the Appellee to pay her attorney's fees or face the possibility of losing the home in which the parties' children reside.

- vii. Pursuit of this appeal is in furtherance of the Appellant's intention, found to be in bad faith, of refusing to pay child-support.
- viii. The result that the Appellant seeks would be a detriment to the parties' children. In addition to creating a support arrearage, to prevent the home in which the children reside from being lost in foreclosure, the Appellee would have to pay the Appellant's attorney fees.
- ix. The Appellant's attorney is acting in concert with the Appellant in pursuing objectives found to be in bad faith, and pursuit of the bad faith objective is for the benefit of the Appellant's attorney.

#### **CITATION TO THE RECORD SHOWING THAT THE ISSUE WAS PRESERVED IN**

#### **TRIAL COURT**

The trial court ordered that the Appellant pay a portion of the Appellee's attorney's fees.

#### **SUMMARY OF ARGUMENTS.**

1. The Appellant seeks to raise a new issue: At the evidentiary hearing of June 29, 2001,

the Appellee requested that the Appellant's equitable lien be offset against the support arrearage that had accumulated in the four years since the Decree of Divorce as the Appellant had refused to voluntarily pay any of her support obligations. The refusal resulted in one of many findings of bad faith against the Appellant. The issue the Appellant raised before the trial court was that the trial court did not have jurisdiction over the equitable lien any longer, as the Appellant had assigned the lien to her attorney. Contradicting the stance she took before the trial court, the Appellant now acknowledges that the trial court could offset the Appellant's support obligation against her equitable lien. The issue that the Appellant now raises is that by way of a trust deed, her attorney now has a lien against her equitable interest, and her attorney's lien on her equitable lien, cannot be affected by subsequent judgments for child-support. The case law makes clear that unless certain exceptions are met, the Appellant is forbidden from raising a new issue on appeal. The Appellant does not claim that any exceptions exist which would allow her to raise this new issue.

2. The Appellant's new issue is founded upon an erroneous presumption: The presumption underlying the Appellant's new argument is that the arrearage had to be reduced to judgment and any judgments that are subsequent to the trust deed cannot affect the equitable lien. The case law provides that a trial court may offset a support arrearage against an equitable lien even when the support arrearage cannot be made a judgment.

3. The Appellant and her attorney should be jointly and severally responsible for the Appellee's costs and fees: There are two basis for fees against the Appellant. First, the trial court ordered that the Appellant pay a portion of the Appellee's fees. Secondly the Appellant was found by the trial court to be proceeding in bad faith in pursuing an issue that seeks to deprive the children of child support. Pursuit of a bad faith issue on appeal is a frivolous appeal under Rule 33 of the Utah Rules of Appellate Procedure.
- There are two grounds upon which the Appellee seeks that the Appellant's attorney also be ordered to pay Appellee's fee on appeal. Both reasons are grounded in Rule 33 of the Utah Rules of Appellate Procedure. The first reason relates to substance of the Appellant's brief. The Appellant fails to provide any case law or any other justification for the key point, that the arrearage had to be made a judgment to offset against the Appellant's equitable lien. The Appellant also seeks to raise a new issue on appeal.
- The second grounds upon which damages are appropriate against the Appellant's attorney is that the Appellant's attorney is acting in concert with the Appellant to aid in the Appellant's bad faith effort to deprive the children of support. More egregious still is that it is the Appellant's attorney who seeks the benefit by way of appeal, without regard to the damage caused to the parties' children.



## **ARGUMENT**

### **POINT ONE:**

#### **THE APPELLANT IS SEEKING TO RAISE A NEW ISSUE ON APPEAL.**

Pursuant to the Decree of Divorce that was entered on March 21, 1997, the Appellee was awarded sole custody of the three children, the Appellant was ordered to pay child-support and other support related obligations. The Appellant was awarded alimony, terminable upon a number of conditions, including the Appellant's cohabitation. The Appellee was awarded the marital home subject to the Appellant's equitable lien of \$34,000.

On June 29, 2001 the trial court conducted an evidentiary hearing. One of the issues was whether alimony should terminate due to the Appellant's cohabitation. Another issue was the Appellant's child-support arrearage. From the time of the Decree of Divorce, the Appellant did not voluntarily paid child-support or any support related obligations. The only child-support the Appellee received in the four years since the Divorce was \$3,234.19 that had been garnished by the Office of Recovery Services. The trial court did offset \$21,970.54 against the Appellant's equitable lien, \$4,000 of which was the attorney's fees assessed against the Appellant, and ruled that the Appellant's obligation be augmented by any reasonable arrearages for child-support. The Appellant's equitable lien was finally extinguished by virtue of the order arising out of a hearing of February 23, 2005.

The issue that the Appellant presents on appeal is not the issue that the Appellant presented to the trial court. The issue that the Appellant raised at the evidentiary hearing of

June 29, 2001 was that as she had assigned the equitable lien to her attorney the trial court no longer had jurisdiction. As the Court stated in paragraph 9 of the Findings of Fact the issue that the Appellant had raised was that “the equitable lien cannot be altered or offset against the obligations that she owes the petitioner in that she has assigned her equitable lien to her attorney.”

The Appellant takes a new tack, raises a new issue on appeal. The Appellant had, before the trial court, raised the issue that the trial court could not offset the equitable lien as it was transferred to her attorney. In direct contradiction, the appellant now acknowledges that the trial court did have continuing jurisdiction over the equitable lien. Referencing the trial court’s ability to make offsets against the Appellant’s equitable lien, the Appellant states on page 15 of her brief that “the trial court was well within its discretion to make such a determination.” The Appellant’s new issue is that by virtue of the trust deed that was recorded on February 28, 1987 the Appellant’s attorney now has a lien on the Appellant’s equitable lien, and the Appellant’s attorney’s lien takes a “priority” over any judgments that post date the trust deed, including any child-support judgments.

As the Court made clear in State v. Irwin, 924 P.2d 5 (Utah Ct. App. 1996), unless an Appellant claims plain error, makes reference to exceptional circumstances or ineffective assistance of counsel, an Appellant cannot raise an issue for the first time on appeal.

The Appellant raises a new issue on appeal. As is set forth in the trial court’s Findings, the issue that the Appellant raised before the trial court was that the trial court could not offset

the equitable lien as it had been assigned to her attorney. The Appellant did not file any post-trial motions seeking additional findings. The Appellant does not challenge the findings the trial court did make. On appeal, the Appellant now acknowledges that the trial court could offset the equitable lien. The issue that the Appellant now raises is that the trust deed her attorney recorded on February 28, 1987, is a lien against her equitable interest, and her attorney's trust deed takes priority over subsequent recorded judgments. The lesson of Irwin is that an appellant is not provided with an opportunity to present a novel issue on appeal. The Appellant does not claim that any of the exceptions to the general rule as set forth in Irwin would allow her to present the new issue on appeal. The Appellant even ignored the requirement of Rule 24(a)(5)(A), Utah Rules of Appellate Procedure, which requires a party to demonstrate that the issue being raised on appeal was raised before the trial court. While the Appellant does make reference to the trial court's Minute Entry of November 7, 2000, in which the trial court states that it will "resolve the issue of priority", the Appellant fails to demonstrate that she did raise the issue at the evidentiary hearing of June 29, 2001. To the contrary, the trial court's findings demonstrate that the Appellant raised a different issue before the trial court.

**POINT TWO:**

**A SUPPORT ARREARAGE DOES NOT HAVE TO BE REDUCED TO JUDGMENT**

**TO BE OFFSET AGAINST AN EQUITABLE LIEN**

The crux of the Appellant's issue is that as she transferred her equitable lien on the

former marital home to her attorney by trust deed, her attorney's equitable interest cannot be reduced by any child-support arrearage that was not yet a judgment at the time of the trust deed. The Appellant claims that her attorney's interest takes "priority" over any judgments for child-support. The failure of the Appellant's argument is the erroneous proposition that it was necessary for the trial court to award the Appellee a judgment which would then need to be offset against the equitable lien. In Coulon v. Coulon, 915 P.2d 1069 (Utah Ct. App. 1996), 11 years after the Decree of Divorce had been entered, Mr. Coulon brought an action to foreclose his equitable lien against the former marital home. Ms. Coulon contended that the equitable lien should be offset against the total support arrearage, even the arrearage that was more than eight years old (78-22-1 Utah Code Annotated provides that judgments exist for eight years), and could no longer be a judgment. The Court agreed with Ms. Coulon, and even though portions of the arrearage were no longer a judgment, nor could they become a judgment, the total arrearage was offset against the equitable lien.

The Coulon case announces the simple proposition; a support arrearage can be offset against an equitable interest even if the arrearage is not a judgment. There is no requirement that the arrearage be reduced to judgment in order to offset an equitable lien. This simple proposition undermines the Appellant's argument which is premised on the contention that her attorney's equitable lien takes "priority" over any judgments that accrued after filing of the trust deed that transferred her equitable lien. As Coulon demonstrates, an equitable lien can be offset by an arrearage without the arrearage being reduced to judgment. Equitable lien can be

reduced by an arrearage that cannot be reduced to judgment.

The decision of Wiles v. Wiles, 871 P.2d 1026(Utah Ct. App., 1994) also has impact on the instant case. Ms. Wiles had been awarded the marital home, and ordered to pay Mr. Wiles \$6,000 within 10 years. Mr. Wiles was given a lien against the marital home in the amount of \$6,000. Mr. Wiles would then be entitled to foreclose his lien if Ms. Wiles did not pay the \$6,000 within 10 years. Ms. Wiles did not pay the \$6,000. Ms. Wiles sought to prevent Mr. Wiles from foreclosing by claiming that the homestead exemption she had filed prevented foreclosure. In holding that Ms. Wiles could not prevent foreclosure by claiming a homestead exemption, the Court stated:

When the divorce decree was entered in this case, the trial court divided the parties' property by awarding the real property and mobile home to Ms. Wiles and ordering that Mr. Wiles in return pay \$6,000 to her ex-husband within a ten year period. As is often the case when a trial court divides marital property, the court created a "lien" on the real property awarded Ms. Wiles pending payment to Mr. Wiles of the value of his share of that property. As the trial court correctly reasoned in its decision on this matter, to allow Ms. Wiles to assert a homestead exemption against the real property "would defeat the purposes of the Divorce Decree and specifically would frustrate the Court['s] ability to divide the property in a divorce proceeding." We agree and hold that the trial court's distribution of the Wiles' property, including placement of the lien, supersedes Ms. Wiles' ability to enforce the homestead exemption against her husband's interest in the real property created by the court. id at 1029.

There are crucial similarities between Wiles and the instant case. Ms. Wiles did not pay Mr. Wiles what the trial court had ordered her to pay. In the instant case the Appellant refused

to pay the child-support that the trial court had ordered her to pay. Ms. Wiles sought to prevent foreclosure by interposing her homestead exemption. In the instant case the appellant seeks to prevent the reduction of her equitable lien by claiming the equitable lien was transferred to her attorney. While Ms. Wiles may very well have been entitled to a homestead exemption, that homestead exemption could not be used to prevent the court from dividing the parties' property as the court deemed it was appropriate. Similarly, in the instant case, transferring an equitable lien cannot be used to upset or interfere with the trial court's determination that the Appellant pay child-support. Just as in Wiles, where the homestead exemption may in and of itself not have been wrongful, it cannot be used to upset the trial court's order.

**POINT THREE:**

**ATTORNEY'S FEES SHOULD BE ASSESSED AGAINST THE APPELLANT AND  
THE APPELLANT'S ATTORNEY**

A. Damages against the Appellant:

There are two grounds upon which the Appellee seeks attorney's fees against the Appellant. Attorney's fees were awarded to the Appellee by the trial court and pursuant to Utah Department of Social Services v. Adams, 806 P. 2d 1193 (Utah Ct. App. 1991), "the general rule is that when a party who received attorney fees below prevails on appeal, the party is also entitled to fees reasonably occurred on appeal." *id* at 1993. The second ground upon which the Appellee seeks attorney's fees against the Appellant is that the Appellant is pursuing her bad faith intent (as found by the trial court) to deprive the children of support. As the Court

stated in “an appeal brought from an action which is properly determined to be in bad faith is necessarily frivolous under Utah Rules of Appellate Procedure 33.” *id* at 1197. As the trial court determined that the Appellant was proceeding in bad faith, the instant appeal is frivolous.

B. Damages against the Appellant’s attorney:

Rule 33 of the Utah Rules of Appellate Procedure states that “if the court determines that a motion made or an appeal taken under these rules is either frivolous or for delay, it shall award just damages, which may include single or double costs, as defined in rule 34, and/or reasonable attorney fees, to the prevailing party. The court may order that the damages be paid by the party or by the party’s attorney.”

Rule 33 defines a frivolous appeal as “one that is not grounded in fact, not warranted by existing law, or not based on a good faith argument to extend, modify, or reverse existing law”.

The Appellant may argue that pursuant to Rule 33 the Appellee must choose whether to seek damages pursuant to Rule 33 against the Appellant, or the Appellant’s attorney, but not both. If the Court were to determine that Rule 33 authorizes damages against a party, or the party’s attorney, but not both, the Appellee requests that the Court order that the Appellant be responsible for the Appellee’s attorney’s fees not under Rule 33 but pursuant to the ground that the Appellee was awarded attorney’s fees by the trial court, and that the Appellant’s attorney be responsible for damages pursuant to Rule 33. There are two grounds on which the Appellee seeks attorney’s fees under Rule 33 of the Utah Rules of Appellate Procedure against the Appellant’s attorney. The first of those two grounds is that the content of the Appellant’s brief

is frivolous. The second ground is that the Appellant's attorney is pursuing a bad faith issue, aiding the Appellant in her bad faith intention of not paying child-support, and seeking to take unconscionable advantage of the Appellee.

Pursuant to Rule 33 of the Utah Rules of Appellate Procedure, an appeal that is not "warranted by existing law, or based on a good faith argument to extend, modify or reverse existing law", is frivolous. The Appellee construes Rule 33 to mean that for every issue raised on appeal the brief must contain a discussion as to why case or statutory law supports the appellant's position, or a legitimate, good faith argument as to why the case law should be modified, or why statutory law should not apply to the issue raised on appeal. The Appellee recognizes that a good faith argument is not necessarily a winning argument. The Appellant fails to provide any case law or statutory reference for support of her key issue. The Appellant does not make even a cursory attempt to present an argument as to why case law should be modified. The Appellant's sole issue is that as she conveyed her equitable lien to her attorney, the bad faith child-support arrearage cannot affect her attorney's interest, as the arrearage is a judgment that postdates the trust deed to her attorney. While the Appellant does make reference to statutes regarding the recordings of judgments, those references ignore unbridgeable chasms in the Appellant's brief. The Appellant fails to present any authority or even an argument that an arrearage must be made a judgment in order to be offset against equitable lien. The Appellant fails to provide any argument why the case law that that does not provide that the court can offset an equitable lien without reducing that arrearage to a judgment



should be reversed, or modified. The Appellant fails to provide any legal support for the outcome the Appellant seeks, that a support obligor and her attorney, acting in concert can deprive a custodial parent of the child-support that the Appellant failed to pay, and then when the court seeks to offset the child-support arrearage against the obligor's equitable lien the obligor claims that the attorney's interest is entitled to "priority". In Sanders v. Leavitt, 37 P.3d 1052 (Utah 2001), attorney's fees were assessed under Rule 33 against the Appellant's attorney who presented no authority or argument for the key issue on appeal. As the Appellant's attorney in the instant case fails to provide any case law that supports the issue that the Appellant does raise, as the Appellant's attorney ignores controlling case law and as the Appellant's attorney fails to set forth a good faith argument why controlling case law should be modified, the Appellant's attorney has presented a frivolous appeal.

Whether an appeal is frivolous is not solely a function of whether an appellant has attempted to present supporting law or argue for the modification of controlling precedent. Pursuant to the decision in Eames v. Eames, 735 P.2d 395 (Utah App. 1987), an appellant's underlying motives may also be considered.

"... when there is no basis for the argument presented... the Court must question the party's motives... the totality of defendant's argument compels this Court to find that he is attempting to take unconscionable advantage of his wife and that this appeal is frivolous. Therefore, it fails to meet the standards of good faith and R.Utah Ct.App. 33(a) applies." id at 397.

The Appellant's motives are clear. As found by the trial court, the Appellant does not intend to pay child-support. The trial court found that the Appellant, in arguing that the trial

court could not offset or reduce her equitable lien, is seeking to “further deprive the children of child-support”. The Appellant’s attorney should not be held responsible for his client’s motives, or his client’s bad faith. The Appellant’s attorney should be responsible for promoting the Appellant’s bad faith, for acting in concert with the Appellant to seek to undermine the trial court’s order that the Appellant pay child-support and in pursuing an issue found to be in bad faith that is only to the Appellant’s attorney’s benefit, and seeking an outcome that is unconscionable.

It is not anticipated that an attorney will take on any cause or pursue any issue on behalf of a client, regardless of how egregious the client’s position is. Rule 11 of the Utah Rules of Civil Procedure and Rule 40 of Utah Rules of Appellate Procedure are guardians of that standard. Similarly in O’Brien v. Rush, 744 P.2d 206 (Utah Ct. App. 1987), the Court stated, “However, since a party has already been to court once and has the benefit of one ruling the decision to appeal should be reached only after careful consideration by the party and **counsel**” *id.* at 310 (emphasis added).

In the instant case the Appellant’s attorney has decided to pursue an issue found to be in bad faith, all in an effort to aid the Appellant to pursue her intention that she not pay child support. The Appellant’s attorney is not only pursuing an issue found to be in bad faith, based on an intention found to be in bad faith, but also ignoring case law and in seeking to raise a new issue on appeal.

Rule 33 damages are appropriate against Appellant’s attorney in that Appellant’s

attorney has undertaken to participate with the Appellant to raise a bad faith issue and seek a result found to be in bad faith. While there is no reason to believe that the Appellant's attorney condones the Appellant's refusal to pay child-support, the Appellant's attorney has participated in the Appellant's scheme to not pay child support. The Appellant conveyed her equitable lien to her attorney purportedly as the Appellant claims on page 3 of her brief, "in payment of legal fees". The transfer of the equitable lien to the Appellant's attorney is interposed as the reason why the equitable lien cannot be offset so as to be deemed a payment of child support. As the Appellant's attorney has participated in a bad faith scheme, he should be responsible for the Appellee's fees.

As was set forth above, an appeal is frivolous where the Appellant is seeking to take "unconscionable advantage of the other party". The Appellant's attorney seeks to take unconscionable advantage over the Appellee. The Appellant's attorney has participated with the Appellant in a scheme which, as the trial court found, seeks to deprive the parties' children of support. The deprivation of support is only one element of the unconscionable advantage the Appellant's attorney seeks. If the Court were to determine that the bad faith child-support arrearage should not have been offset against the Appellant's equitable lien, the Appellant's attorney will seek to use the equitable lien to have the Appellant pay the fees that the Appellant failed to pay her own attorney. If the Appellee were unable to raise the funds to pay the Appellant's attorney, presumably the Appellant's attorney would foreclose the lien, causing the parties' children to lose their home. The unconscionable result the Appellant's attorney

seeks is to undo the \$34,000 offset against the equitable lien, thereby depriving the children of \$34,000 in support, and then have the Appellee pay the Appellant's fees for which could also be up to the amount of \$34,000. A \$34,000 support arrearage, and a \$34,000 payment to the Appellant's attorney would result in a \$68,000 deficit for the Appellee, the Appellant would not have paid her attorney and the Appellant, who has acted in bad faith in so many ways, would not have paid support.

Certainly the Appellant's attorney has a right to be paid by the Appellant. The Appellant's attorney may complain that he is just seeking to exercise that right. The Appellant's attorney has other chances available to seek payment. As was set forth in Fisher v. Fisher, 67 P.3d 1055 (Utah Ct. App. 2003), the Appellant's attorney has options to seek payment. The Appellant's attorney may claim that he is not intending to undo the trial court's order that the Appellant pay child-support. Regardless of what the Appellant's attorney intends, the foreseeable effect is an unconscionable result.

### **CONCLUSION**

The Appellee requests that the trial court's decision be affirmed.

### **ADDENDUM**

No addendum is necessary.

DATED this 21<sup>st</sup> day of December 2006.

SKORDAS, CASTON & HYDE, LLC



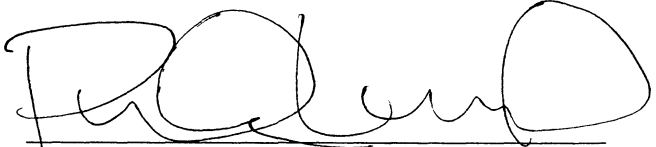
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Harry Caston

**CERTIFICATE OF SERVICE**

I hereby certify that on the 21<sup>st</sup> day of December 2006, I mailed two (2) true and correct copy of the foregoing **BRIEF OF APPELEE AND CROSS-APPELLANT**, by United States first class mail, postage pre-paid, to the following:

Randy Ludlow  
Attorney for Respondent and Appellant  
185 South State Street, Suite 208  
Salt Lake City, UT 84111

  
\_\_\_\_\_  
Skordas, Caston & Hyde, L.L.C.